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Updated May 27, 2022

Prior Converted Cropland Under the Clean Water Act

For decades, the value of wetlands and efforts to protect them have been recognized in different ways through national policies, federal laws, and regulations. The central federal regulatory program, authorized in Clean Water Act (CWA) Section 404 in 1972, requires permits for discharges of dredged or fill material (e.g., sand, soil, excavated material) into wetlands that are considered "waters of the United States" (WOTUS). Also, the Food Security Act (FSA) of 1985—enacted on December 23, 1985—included a wetland conservation provision (Swampbuster) that indirectly protects wetlands by making producers who farm or convert wetlands to agricultural production ineligible for selected federal farm program benefits. Both FSA and CWA Section 404 regulations include exceptions to their requirements for *prior converted cropland* (PCC). While both include exceptions for PCC, determinations are made under separate authorities and for different programmatic purposes. This has created confusion for some affected landowners, who argue for greater consistency among PCC determinations. It has also generated some congressional interest in aligning the requirements for PCC.

What Is PCC?

The CWA Section 404 program and Swampbuster provision require the administering agencies to make certain determinations about wetland areas, including whether an area qualifies as PCC. While historically the agencies defined PCC similarly, the way the agencies have determined what qualifies as PCC has diverged over time.

Clean Water Act

Under the CWA, discharges of pollutants into WOTUS are unlawful unless authorized by a permit. Section 404 permits authorize discharges of dredged or fill material into WOTUS, including wetlands (33 U.S.C. §1344). The Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) are responsible for implementing various aspects of the Section 404 permitting program.

Most routine, ongoing farming activities do not require CWA Section 404 permits. CWA Section 404(f) exempts normal farming, silviculture, and ranching from permitting requirements. However, if a farming activity is associated with bringing a WOTUS into a new use where the flow, circulation, or reach of that water might be affected (e.g., bringing a wetland into agricultural production or converting an agricultural wetland into a nonwetland area), that activity would require a permit.

The CWA does not define or mention PCC explicitly. However, CWA regulations exclude PCC from the definition of WOTUS and therefore the act's permitting requirements. In 1990, the Corps issued Regulatory Guidance Letter 90-07, which created one of the first direct links to Swampbuster. It clarified that PCC, as defined by U.S. Department of Agriculture's (USDA's) Natural Resources Conservation Service (NRCS) in its 1988 National FSA Manual, are not subject to regulation under CWA Section 404. The manual defines PCC as wetlands that "were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985, to the extent that they no longer exhibit important wetland values."

In 1993, the Corps and EPA codified into regulation the existing policy that PCC are not WOTUS (58 *Federal Register* 45008). In the rule's preamble, the agencies referenced the definition of PCC from the National FSA Manual. They also indicated that any PCC that were abandoned, per the NRCS provisions on abandonment, and reverted back to wetlands could be "recaptured" and subject to CWA regulation. Specifically, per the preamble, PCC that "now meets wetland criteria is considered to be abandoned *unless*: For once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production." Although the definition and abandonment criteria were included in the rule's preamble, they were not included in Corps and EPA regulations.

In 2015, the Corps and EPA promulgated the Clean Water Rule (80 *Federal Register* 37054) during the Obama Administration, which established a revised definition for WOTUS. It maintained the PCC exclusion as it existed in the 1993 rule and similarly did not define the term or include abandonment criteria in the rule itself.

In 2020, during the Trump Administration, the Corps and EPA published the Navigable Waters Protection Rule (NWPR) to revise the definition of WOTUS (85 *Federal Register* 22250). The rule maintained the PCC exclusion, defined PCC, and clarified abandonment criteria. The NWPR defined PCC as "any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible." PCC would lose its status for CWA purposes when it "is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years" and the land reverts to wetland status. The NWPR text did not define *agricultural purposes* for determining abandonment, but the rule's preamble stated that "agricultural purposes include land use that makes production of an agricultural product possible, including but not limited to grazing and haying." The preamble also said that cropland left idle or fallow for conservation or agricultural purposes for any period of time remains in agricultural use and maintains PCC status. The term *agricultural purposes* appeared to broaden the exception for CWA purposes. In contrast, under the abandonment criteria

in the 1993 rule's preamble, an area was required to be used for *production* of an agricultural commodity. The NWPR also stated that the Corps and EPA would recognize PCC designations made by the Secretary of Agriculture.

Following the NWPR's issuance, numerous groups filed lawsuits challenging it, and in September 2021, a federal district court vacated it. The Corps and EPA then announced that they would halt implementation of the rule and interpret WOTUS consistent with regulations in place prior to 2015 (see CRS Report R46927, *Redefining Waters of the United States (WOTUS): Recent Developments*).

During the Biden Administration, the Corps and EPA have initiated the first of two anticipated rulemakings to revise the definition of WOTUS. In December 2021, the agencies published a proposed rule to restore regulations in place prior to 2015, updated to reflect consideration of relevant Supreme Court decisions (86 *Federal Register* 69372). The 2021 proposal includes the PCC exclusion as published in 1993. The agencies also requested comments on changes that could enhance consistency between PCC status under Swampbuster and the CWA, such as which criteria to apply in determining when PCC loses its exclusion. (See "Challenges to Consistent Determinations.")

Food Security Act, Swampbuster Provision

The Swampbuster provision is administered by USDA with technical determinations made by NRCS. Originally authorized in Title XII of the 1985 FSA (16 U.S.C. §§3801 et seq.), Swampbuster makes USDA program participants ineligible to receive select USDA program benefits if they farm on or alter wetlands. Thus, Swampbuster does not prohibit the altering of a wetland but rather disincentivizes doing so by withholding a number of federal payments that benefit agricultural production.

Generally, farmers who plant a program crop on a wetland converted after December 23, 1985, or convert wetlands making agricultural commodity production possible after November 28, 1990, would be in violation of Swampbuster and ineligible for certain USDA benefits (e.g., farm support payments, loans, conservation programs). In addition, farmers who plant or produce an agricultural commodity on a wetland or make agricultural production possible after February 7, 2014, are in violation and also ineligible for federal crop insurance premium subsidies. A number of Swampbuster exemptions exist, including land determined to be PCC. The USDA defined PCC in regulation (7 C.F.R. 12.2(a)) as "a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and did not meet the hydrologic criteria for farmed wetland."

Challenges to Consistent Determinations

Although the agencies overseeing the CWA Section 404 and Swampbuster programs have sought to achieve consistency in the manner that the programs define and designate PCC, the inherently different purposes of the programs—as well as legislative changes and court rulings—have presented challenges in doing so.

In 1994, USDA, the Departments of the Interior and the Army, and EPA entered into a memorandum of agreement to promote consistency in determinations made under the two wetlands programs. However, Congress amended Swampbuster in 1996 to state that USDA certifications of eligibility for program benefits "shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary" (P.L. 104-127). This created inconsistency between the wetlands programs, as the criteria for determining when PCC loses its exclusion became different (i.e., abandonment for CWA versus change in use for Swampbuster). In addition, 2002 amendments to Swampbuster (P.L. 107-171) prohibited NRCS from sharing confidential producer information to agencies outside USDA, making it illegal for NRCS to provide its wetland delineations and determinations to the Corps and EPA for CWA permitting and enforcement. Furthermore, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001), the Supreme Court interpreted the scope of WOTUS subject to the CWA more narrowly than the Corps had previously. The agencies interpreted the ruling to mean that some isolated wetlands may no longer be regulated as WOTUS under the CWA but may still be subject to Swampbuster. These changes and the Court's ruling prompted the agencies to withdraw from the 1994 memorandum in 2005.

Subsequently, USDA and the Corps issued joint guidance in February 2005 to reaffirm their commitment to ensuring the wetlands programs were administered in a way that minimized impacts on affected landowners while protecting wetlands. They recognized that "because of the differences now existing between the CWA and FSA on the jurisdictional status of certain wetlands (e.g., prior converted or isolated wetlands may be regulated by one agency but not the other), it is frequently impossible for one lead agency to make determinations that are valid for the administration of both laws." The guidance reiterated that a PCC determination made by NRCS remains valid for Swampbuster purposes so long as the area is devoted to an agricultural use. It also stated that if the land changes to a nonagricultural use, the determination is no longer valid, and a new determination is required for CWA purposes.

In 2009, the Corps Jacksonville District prepared an issue paper declaring that PCC that is shifted to nonagricultural use becomes subject to regulation by the Corps. Corps headquarters affirmed this "change in use policy" as an accurate reflection of the national position of the Corps in a memorandum often referred to as the "Stockton Rules." A federal court set aside the rules in 2010, finding that they were "procedurally improper" because the Corps did not follow required notice-and-comment procedures.

In January 2020, the Corps and NRCS rescinded the 2005 guidance. Subsequently, in July 2020, the Corps, EPA, and NRCS issued a joint memorandum that provides procedures for agency staff to help ensure that the programs are administered in an efficient and effective manner while continuing to fulfill the missions of the respective agencies.

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